IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 17TH SEPTEMBER 2007 / 26TH BHADRA 1929

CRL.A.No. 1353 of 2007()

SC.70/2005 of ADDL.DISTRICT & SESSIONS COURT, VADAKARA

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APPELLANT/ACCUSED:

SUBASH, S/O MADHAVAN,
C.NO.5048, CENTRAL PRISON,
KANNUR.

BY ADV. P.V.VIJAYAKUMAR [STATE BRIEF]

RESPONDENT/STATE:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 1353 OF 2007

Dated this the 17th day of September, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.70 of 2005 on the file of the Additional District and Sessions Court, Vadakara. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant - accused was that on 1.9.2003 at about 6.30 p.m. while PW.1, the Sub Inspector of Police, Edachery Police Station was on Law and Order duty along with a police constable, he saw the accused near the autoricksha stand of Mahe railway station with a plastic bag in his hand and that on examination of the bag, it was found to contain Indian made foreign liquor (Doctors grape brandy). in 3 bottles of 375 ml. capacity and 8 bottles of 180 ml. capacity without any valid documents. To prove the case against the appellant, the prosecution examined PWs.1 to 7 and produced Exts.P1 to P8 as well as MOs.1 to 4. No oral or documentary evidence was adduced on the side of

the defence. On closing the evidence of the prosecution, the accused was questioned under Section 313 Cr.P.C. The accused denied the prosecution charge and stated that he was taken by the police while he was standing at the bus top. After considering the evidence adduced by the prosecution, the trial court found the accused guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for one and a half years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. Set off was also allowed under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and hence the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The main grounds urged in the appeal in challenging the judgment of the trial court are as follows: (i) the trial court committed serious error in believing the prosecution witnesses to find the appellant guilty of the charges, as the evidence adduced by the prosecution is not sufficient to conclude that the appellant committed the offence as alleged

by the prosecution, (ii) the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally sustainable in the light of the decisions of this Court reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631** and (iii) as the prosecution has not adduced any evidence regarding sale or transport of the contraband articles, the finding of the trial court that the appellant committed offence either under Section 55(a) of the Abkari Act or Rule 9 of the Foreign Liquor Rules is not sustainable and that at the maximum, the appellant can be found guilty only under Rule 11A of the Foreign Liquor Rules read with Section 63 of the Abkari Act.

5. With regard to the first contention, it is seen that the trial court relied on the evidence of PWs.1 to 5. PW.1 was the detecting officer. He stated before the court below that on the date of the incident, while he was on Law and Order duty along with PW.2, a police constable, he saw the accused near the autoricksha stand of Mahe railway station with a plastic bag in his hand and that on examination of the bag, it was found to contain 11 bottles of Indian made foreign liquor (Doctors grape brandy). without any valid documents. He further stated that after taking sample in a bottle of 375 ml. capacity, he arrested the accused on issuing Ext.P1

arrest memo and seized the contraband articles as per Ext.P3 seizure mahazar. The evidence of this witness is corroborated by the evidence of PW.2, the police constable who had accompanied him on the date of the incident. PWs.3 and 4, the two independent witnesses examined in the case also supported the case of the prosecution. PW.5 was the officer who took charge of the investigation. PW.6 was the Sub Inspector of Police, Edachery who completed the investigation and laid the charge sheet after obtaining Ext.P8. chemical analysis report. PW.7 was the clerk of the Judicial First Class Magistrate's Court, Vadakara who received the properties in the court on 2.9.2003. The evidence of these witnesses was not challenged by the defence. Hence, the trial court was justified in accepting the evidence of PWs.1 to 7.

6. With regard to the second contention, it is seen that as per the evidence of PW.1, the appellant was found in possession of the contraband articles on the date of the incident without any valid documents. But, neither PW.1 nor the other witnesses examined had a case that the Indian made foreign liquor found in the possession of the appellant was in connection with export, import, transport or transit or for sale. As per the principles laid down by this Court in the decisions reported in **Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v.**

State of Kerala, 2005(2) K.L.D. (Cri) 631, to attract an offence under Section 55(a)of the Abkari Act, the prosecution should allege and establish that the possession of the contraband articles by the appellant was in connection with export, import, transport or transit. Mere possession of the contraband articles will not attract an offence under Section 55(a) of the Abkari Act. The evidence adduced by the prosecution would not show that the possession of the contraband articles was in connection with export, import, transport or transit. Hence, the finding of the trial court that the appellant committed offence punishable under Section 55(a) of the Abkari Act is not legally sustainable. The prosecution had also not proved that the appellant was engaged in the sale of the contraband articles at the place of occurrence. Hence, this Court is of the view that the appellant had not violated Rule 9 of the Foreign Liquor Rules. However, the evidence adduced by the prosecution was accepted by the trial court to hold that the appellant was found in possession of 11 bottles of Indian made foreign liquor without any licence or permit and that too beyond the permissible limit prescribed in the notification issued by the Government under Sections 10 and 13 of the Abkari Act. The possession of Indian made foreign liquor will not attract an offence under Section 55(a) of the Abkari Act. The offence will come only under Rule 11A of the Foreign Liquor Rules punishable under Section 63 of the Abkari Act. Rule 11A of the

Foreign Liquor Rules reads as follows:

> "No quantity of foreign liquor in excess of 1.5 litres shall be possessed or stored by any person within the State unless the same is covered by a permit issued by the officer in charge of the Division concerned.
>
> Provided that a person can possess or store within the State a quantity of foreign liquor not exceeding the quantity notified by the Government under section 10 and 13 of the Act without a permit issued by the concerned authority."

7. In the above circumstances, the conviction and sentence ordered against the appellant - accused by the trial court are set aside. The appellant is found guilty under Rule 11A of the Foreign Liquor Rules read with Section 63 of the Abkari Act.

8. The next question to be considered is regarding the sentence to be awarded against the appellant. The incident happened in the year 2003 and the appellant is undergoing imprisonment since 29.6.2007. Taking into account the nature of the offence committed by the appellant, this Court is of the view that a sentence of rigorous imprisonment for two months and fifteen days and a fine of Rs.2000/- will meet the ends of justice. Accordingly, the appellant is convicted under Rule 11A of the

Foreign Liquor Rules and sentenced to undergo rigorous imprisonment for two months and fifteen days and to pay a fine of Rs.2000/- and in default of payment of fine, to undergo simple imprisonment for a further period of fifteen days. The appellant is also entitled to set off under Section 428 Cr.P.C.

The Crl. Appeal is allowed in part.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.1353/2007

JUDGMENT

17th SEPTEMBER, 2007